



Ambassador Jeffrey L. Bleich – University of Queensland

**Remarks of Ambassador Bleich
at the University of Queensland Law Society's Inaugural
Minter Ellison Sir Harry Gibbs Lecture, Brisbane**

(As prepared for delivery –August 13, 2012)

Introduction

Thank you for those warm words of introduction, and thank you to UQLS and the TC Beirne School of Law for hosting this event and inviting me to speak.

It's a real honor to be invited to deliver the inaugural Minter Ellison Sir Harry Gibbs Lecture. But I have to admit that being the first person to deliver any lecture generates some mixed feelings.

On the one hand being first means, you don't have to worry about comparisons to the person who preceded you. In a couple of my prior jobs, I had the unfortunate duty of having to speak right after President Obama had finished. [Laughter] I think only one other person can fully appreciate what that experience is like. That person would be, Fred Kaps, the Dutch magician.

On February 9, 1964, Kaps had his national television debut on the Ed Sullivan Show. The act immediately before him was, the Beatles. Imagine Fred beginning one of his card tricks in a room of crying, screaming people who want nothing more in the world than for the Beatles to shove him off the stage and do an encore. [Laughter] The Fred Kaps website politely describes this event as a situation in which the "noisy studio audience" was a "bit restless" after the Beatles and needed to be quieted down by Ed Sullivan before Kaps could complete his performance. [Laughter] So thank you for sparing me the Fred Kaps experience, by letting me go first.

On the other hand, there is also a unique responsibility here. "Inaugural" suggests more to come. But if I deliver a long turgid lecture that induces sleep, dizziness or feelings of being held hostage, [Laughter] then this could be not just the first – but the only – Gibbs lecture. [Laughter] In fact, my Minter Ellison friends told me that if I'm not up to snuff, they'll plan to refer to this as the Corrs Chambers Lecture. [Laughter] So, I've selected a topic that I hope will do justice to this series and particularly Chief Justice Gibbs' good



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name. This lecture series deserves a chance at the longevity that Chief Justice Gibbs' legendary career merits.

So, the topic I've selected tonight concerns one of the most mysterious, arbitrary, and important aspects of the judicial function – namely, how we select and appoint judges.

I'd like to focus on first, why selection matters. Second, how the U.S. process works, and in particular how much politics influences a judge's selection. Third, I'll offer some thoughts on whether this reflects a negative shift from the original design of the U.S. constitution. And finally, I'll conclude with some observations about how this has played out in the jurisprudence of the U.S. Supreme Court. And along the way I'll throw in some anecdotes to hopefully help our chances of keeping the series going.

Why Selection Matters

While my remarks tonight will focus on the selection of U.S. Supreme Court Justices, Chief Justice Gibbs' own career on the High Court of Australia is instructive on how selection matters. It shows how some of the vagaries in choosing jurists transcend differences between our judicial systems, and why seemingly insignificant aspects of selection can matter.

We all like to think that under a judicial system of rules and laws, it should not matter who is on the Court. Once an individual dons the black robes they should, in theory, all be interchangeable, and reach the same results based on objective application of the same neutral principles. But let me offer one innocuous example of how minor facts about a nominee may matter.

When Harry Gibbs was appointed to the High Court by Prime Minister Gorton in 1970 he was relatively young, only 53. This was probably seen as a neutral or possibly even a negative fact. There was an expectation that he'd have plenty of time -- as a junior Justice -- to learn the ropes from his older and longer tenured colleagues, and that his career might extend into his 70s or 80s. In fact, one of his colleagues on the bench, Justice McTiernan, was already 78 when Justice Gibbs arrived. The Court also seemed like a relatively stable and ideologically homogenous place, where shifts in membership were unlikely to affect case outcomes. With only two exceptions, the Court was composed of Justices appointed by Prime Minister Menzies from the Liberal party.

However, in fairly rapid succession, Justice Windeyer retired in 1972, and Justice Owen passed away that same year.

Then Justice Walsh died the following year, and Justice Douglas Menzies died soon after. Moreover, Prime Minister Whitlam was elected during that time, meaning that two of



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those seats were filled by a Labor Prime Minister. Suddenly, still in his mid-50s, Sir Harry was the second most senior member of the High Court with a very different composition.

As it happened, that unprecedented series of events meant that the happenstance of Sir Harry being appointed at a relatively young age had significant consequences. Justice Gibbs' accelerated rise to leadership gave him a seniority on the Court which provided valuable authority to him in his relations with the older Justices who joined afterward. His youth gave him an adaptability to the rapid change in the ideological composition of the Court. This helped him to lead a collegial court despite having different views than several of his brethren. And there was one other important factor about his age. In 1976, Parliament had established a mandatory retirement age for Justices of 70. Being appointed so young, meant that upon the retirement of Chief Justice Barwick in 1981, Justice Gibbs was still young enough to serve on the Court for a relatively long tenure before he himself turned 70 – providing invaluable stability during that challenging period.

Indeed, upon his retirement, Lord Denning, stated: "I would rank Sir Harry Gibbs as one of the greatest of your chief justices, rivalling even Sir Owen Dixon."

No one, at the time Justice Gibbs was appointed, could have guessed how valuable it would be to appoint a relatively young jurist. And so, what this reflects, I think is that events and seemingly insignificant factors about an individual jurist can in fact have a dramatic impact on the shape of court jurisprudence. It also shows that no matter how much political leaders may think they can predict the jurisprudence of a particular jurist, there is an element of chance and luck in the process. No one can ever fully know whether the persons selected will have the qualities needed for the times they face.

The Politics of Judicial Selection

So how do we choose? More specifically, in the United States, how do we select our Supreme Court Justices? I've had the privilege of watching this process from a variety of angles. As a young lawyer, I clerked at the U.S. Supreme Court during the time when Justices Brennan and Marshall retired and Justices' Souter and Thomas were nominated.

As a lawyer, I appeared before the Supreme Court during periods of transition. And finally, in 2009, as Special Counsel to President Obama I had a hand in the appointment of Justice Sonia Sotomayor, and so had a close view of how that process occurs.

Those of you who have watched confirmation hearings in the United States on television, know that it has become virtually a form of theater. In fact, some confirmations have been almost a national obsession, with high television ratings. The failed confirmation



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25 years ago of Justice Robert Bork, the narrow confirmation of Justice Clarence Thomas, the withdrawal of the nomination of Harriet Miers, and the 2009 confirmation of Justice Sotomayor were avidly watched by people around the world, and were frontpage news. I'd like to talk a little about how it came to be that way, and what it means for American law.

For those who haven't followed the U.S. as carefully, our Supreme Court confirmations tend to follow a certain pattern.

First, a vacancy occurs on the Court – either because a Justice passes away or steps down.

I recall that when Justice Marshall retired, it caught everyone by surprise. He had said for over a decade "I was appointed to a life term, and I intend to serve my full sentence." But then at the very end of the last conference of the Term, just as everyone was getting ready to leave, he said: "Before you go, I've got something to say. My father used to say if you want to keep a secret, you should tell just one person." [Laughter] And then he told them.

So a vacancy occurs -- usually when you don't expect it, and that is when the process begins.

Let me describe how the process works. As soon as a vacancy occurs, the media immediately begin analyzing the departing Justice, projecting how the next Justice could affect decisions of the Court. In particular they examine how a new Justice might vote on hot button issues like abortion, the death penalty, affirmative action, and prayer in schools.

Political groups on both sides get very concerned, and begin to demand a particular candidate or type of candidate. There is a great deal of speculation about whom the President has on the short list and who they will nominate.

The President then calls a press conference to announce the selection. The President explains why he believes this is the best person for the job based upon the most high-minded criteria. Invariably, the President notes that the person is brilliant, principled, honorable, and has an impeccable record as a lawyer and/or judge. The President explains that there was no political litmus test, and the nominee was chosen without any concern for their political views. Instead, the only criterion used was to ensure the person was fair and impartial, and would be faithful to the constitution.



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At this point, the nomination goes to the U.S. Senate, where members of the Senate, their supporters, and the media, try to prove that every single thing the President said about the candidate . . . was not true. [Laughter] Staffers pore over the nominee's record looking for any hint of controversy in any public statements they made -- no matter how long ago or in what context. Speeches, panel discussions, articles, opinions, briefs, law school transcripts, are all scrutinized. They also look at who the nominees associated with, and what organizations they've belonged to.

Senators who oppose the President seize on any opportunity to complain that the person is biased; they accuse the President of trying to stack the court with legal ideologues that are out of touch with "real" America. Senators who support the President are equally vigorous in complaining that these critics are engaged in baseless character assassination and that anyone who opposes the President's choice is simply politicizing the confirmation process.

Then, just when this sort of debate has reached a fevered pitch, the nominee is brought before the Senate Judiciary Committee for confirmation hearings. In our process, the nominee makes a statement and then must answer any and all questions posed by the Senators on camera while the entire nation watches.

I was at the Sotomayor hearings and this is a quite a spectacle. Seated beneath the horse-shoe of Senators are dozens of photographers who are piled on top of each other to take photographs of the nominee. The photographers have to stay low so that they don't appear on camera themselves.

They discover pretty quickly that one picture of a person sitting behind a desk answering questions for 8 hours is pretty much like any other picture. [Laughter] So they wait and wait for any sign of movement. Then they pounce. If the candidate raises her hand to make a point, you here this spray of shutters clicking that sounds like a water sprinkler --- ch-ch-ch-ch-ch. [Laughter] In fact, Justice Sotomayor after a while seemed to do this just for fun. She'd say "on the one hand, on the other hand," just to hear the shutters click. [Laughter]

Anyway, depending upon the Senator, many of the questions are designed to get the nominee to say how they feel about some hot-button political issue. The candidate says repeatedly that they can't prejudge any substantive issues that might appear before the Court; that they have no personal views about any of the issues that are raised; that they will review the facts and the law as presented in the context of a case; and they will



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faithfully apply the law including precedents of the Court. Eventually it becomes an endurance contest, with the Senators asking the same questions and the nominee giving the same answers until time runs out.

The Senators then explain how they are voting. Senators who oppose the nominee will say that they felt the answers were evasive and that they remain troubled that some prior statement by that candidate demonstrates the nominee may not be faithful to the Constitution. Senators who support the nominee will praise the nominee's candor and patience, and will tell the nominee that they have precisely the right qualifications and temperament to be a Justice.

Both sides will attack the other for being disloyal to the traditions of the Senate and the values of the Constitution. They will state that they are guardians of a time, way back when, when politics didn't influence decisions about the choice of jurists, and when politicians acted nobly.

After all this, the candidate is selected based on who has the most votes. This is what happens whether the President is a Democrat or a Republican. And so, to me, the definition of a confirmable Supreme Court nominee may come down to a simple formula: A person who is not incompetent and has the good luck to be nominated when the President's party has a substantial majority of the Senate.

The question is whether this is an acceptable way to select justices. In particular, is it true, as the Senators claim, that this system has broken down and we no longer choose Justices based on neutral principles; that we've instead allowed politics to infect this process. My view is that, in fact, this is largely how the American system was always meant to operate, and that by and large it works. I think some improvements could be made, but – as I'll explain in a minute -- if one looks back over the course of history, the selection of Justices has always been political. And yet, events, sometimes random events, tend to have a balancing effect, and the United States has managed to develop an excellent and effective legal system, with a very strong and respected Supreme Court.

Has the Process Changed to Become Political?

If one goes back to the Constitution itself, the process of requiring the President to submit nominees to the Senate for its "advice and consent" was designed to ensure some political check on the President. The section of our Constitution that gives the Senate this power intentionally provides no standards for Senators to use. This is because the writers of the Constitution couldn't agree on any specific standards.

So they compromised - - and provided none. [Laughter] They simply agreed that the President would choose the candidate, and the senate would consent . . . or not based on



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whatever criterion Senators use. Not surprisingly, Senators have used a combination of factors including many political ones.

Rejecting nominees is nothing new. The Senate has rejected nearly 20 percent of all the Supreme Court candidates Presidents have submitted to them. Specifically, the senate has rejected 28 of 147 candidates. On top of that, another 12 candidates, including for example, Harriet Mier, President Bush's original choice to replace Justice Sandra Day O'Connor, were withdrawn because the chances of Senate approval seemed dim.

The Senate has rejected candidates regardless of the popularity of the President or the Senate's belief that he made a nomination in good faith. The very first nominee to be rejected was a Justice nominated by the father of our Country, George Washington, the hero of the revolution, a man often considered our greatest President, and a man revered by every American child for his honesty and commitment to the nation. Even George Washington couldn't secure the nomination his first nominee to be Chief Justice.

The truth is, that with only a few very notable exceptions, Presidents almost always nominate highly qualified people for these jobs – lawyers who had good legal training, many years of successful practice or public service, and the sort of temperament that is likely to help them succeed on the bench. So, the main reasons that the Senate has rejected nominees have tended to be political ones.

Sometimes, the candidate may be too closely aligned with some controversial issue. For example, George Washington's candidate was rejected because he had supported a Treaty with France that some Senators had opposed. Or it could be that the nominee staked out a position on a range of issues where the Court is closely balanced, and changing one member could affect the outcome of a case. Both President Hoover and President Reagan had picks rejected because of concerns the nominee would shift the balance of the Court. Interestingly, in both cases, they went ahead and picked people who were just as conservative, but who managed to be less obvious about it. President Reagan's nomination of Robert Bork failed because people thought he was too aggressively conservative.

Later, President Reagan nominated Justice Scalia who was confirmed unanimously, despite the fact that Justice Scalia is arguably just as conservative as Judge Bork would have been.

On the other hand, a candidate can be rejected for not being political enough. President Grant lost two nominees because Senators felt his picks were too impartial, they were nervous that they couldn't predict how the Justice might ultimately vote. This factor was probably also significant in President Bush's decision to withdraw Harriet Miers because of concerns among some Senators that she was not a reliable enough conservative.



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Now there are some very rare cases in which people are nominated who really do seem mediocre and not up to the job. But that is rare, and the results may explain why Presidents today tend to pick competent, qualified people. President Taft successfully nominated Justice Mahlon Pitney, although Pitney was considered an intellectual lightweight. Taft later got some form of karmic justice; after leaving the Presidency, Taft himself became Chief Justice of the Court and he was forced to serve with Pitney.

Taft complained that Pitney was such an embarrassment that he refused to assign any opinions to him. [Laughter] President Chester Arthur picked a friend who had no idea what being a Supreme Court justice required. Five days after being confirmed, his pick, Roscoe Conkling decided he didn't want it, and he refused to be sworn in. [Laughter] But my favorite case involved a candidate who was actually rejected for a lack of competence. This was G. Harrold Carswell, nominated by President Nixon. There was so little good to say in support of Carswell's achievements that his Senate sponsor, Senator Hruska of Nebraska, defended the nomination by saying this:

"Even if he is mediocre there are a lot of mediocre judges and people and lawyers. [Laughter] They are entitled to a little representation aren't they, and a little chance? [Laughter] We can't have all Brandeises, Cardozos and Frankfurters and stuff like that there. [Laughter]"

To use a lawyer's phrase: "not the winning argument." [Laughter]

But those exceptions prove the rule. The selection and occasional rejection of justices is only very rarely about qualifications or professionalism; most of the time it is about politics.

Over 90 percent of nominees are members of the president's party, and they are invariably picked with the expectation that they will advance the president's goals. This may include some broad policy goal such as "strict construction" or "economic reform." It may also mean some more limited political objective such as satisfying a particular interest group, geographical region, or a faction of the party. Likewise, the Senate does not approach confirmation based purely on ideals about judicial independence. Instead, it will vote at least in part on whether it supports or opposes the President and his goals, and whether it has the public support to defeat a nominee.

This is the way it has always been.

Does Politics Pervert?



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So even if the influence of politics in judicial selection is not new, there is still the question of whether it is pernicious.

Experience tends to suggest that while there are occasional periods where politics seems to play too great a role in judicial decision-making, the nature of democratic politics and judging is that they are self-correcting. While politicians may try to game the system, they're choices are often surprising.

For example, Justice William Brennan who was appointed by Republican President Dwight Eisenhower eventually became the leader of the liberal side of the Supreme Court. The same is true of Justice Stevens who was appointed by Republican Gerald Ford, Justice Harry Blackmun who was appointed by President Nixon, and most recently Justice Souter who was appointed by President Bush. All eventually moved well to the left of their supporters. It has gone the other way as well, with Justice Frankfurter – appointed by President Roosevelt -- who was supposed to be a reliable liberal and proved to be a fairly conservative jurist, and the same is true of Kennedy's pick, Byron White. In fact, the phenomenon of Justices "evolving" while in office is so common, that Justice Clarence Thomas reportedly put on a sign on this desk that promised: "I ain't evolving."

Likewise, the notion that decisions will be made to benefit a particular party or political benefactor has been disproved time after time. A quick review of the Court's most famous cases confirms this. The most important case in all constitutional jurisprudence, *Marbury v. Madison*, involved a decision by which the Supreme Court handed the opposing party – Jefferson's Democratic-Republicans – a victory in order to secure the power of judicial review.

In *Brown v. Board of Education*, all nine justices including a former member of the Ku Klux Klan voted to over-turn racial segregation. In the Nixon tapes case, several Republican appointees including three Justices that Nixon had appointed voted against President Nixon and required him to turn over his tapes. The same with President Clinton's deposition case. And most recently in the Health Care decision, the Chief Justice (appointed by a Republican President) joined a majority to uphold a Democratic President's health care legislation – handing this President a political victory.

Conclusion

So this is my point in the end. We can't remove politics from the confirmation process and we don't need to. Politics has always played a large role in the process and has not corrupted that role.

Indeed, if I have any specific concern, it is that by avoiding the real political nature of the process, we've distorted the nature of confirmation hearings. In 1987, Robert Bork was



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rejected in part because he was very vocal about his controversial views. Since then, Presidents and their nominees have refused to discuss their philosophies in anything but the most general terms.

This has changed the process from being one that openly considers political issues, to one in which we simply guess about the political consequence of a confirming a candidate. So the challenge is not to hide politics, but the opposite - - to make the confirmation process more transparent.

Ultimately, this works because - - while politics can play a role in a judges' thinking - - the desire to protect the institution of judging, the experience of judging, and random factors such as age and timing and new events can have just as great an impact.

So, in sum, I do not agree with those who lament the system of selecting Justices in the United States. Although it can still be improved, it remains largely in line with what the Constitution intended, and history has shown that ultimately in practice, that process works – and works well.